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No. 95-577

(2)

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1995

**CITY OF SANTA ANA,
DAVID REAM AND ROBERT RICHARD,**
Petitioners,

V.

BARBARA LAMBERT, et al.,
Respondents.

**Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit**

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PAUL CROST
Counsel of Record
REICH, ADELL, CROST & CVITAN
Attorneys for Respondents
1918 W. Chapman Avenue, Suite 205
Orange, California 92668-2629
(714) 978-6451

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

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RESTATEMENT OF QUESTIONS PRESENTED

Respondents believe that the only question raised by the petition can be more correctly stated as follows:

Did the Ninth Circuit Court of Appeals correctly hold that a speech by a union official is on a matter of public concern warranting First Amendment protection, where it was made in a public televised session of a city council meeting about mismanagement of a city department which was adversely affecting employee morale and service to the public?

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TO THE UNITED STATES COURT OF APPEALS
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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Respondents Santa Ana City Employees Association and Barbara Lambert respectfully request that this Court deny the Petition for Writ of Certiorari submitted by the City of Santa Ana, David Ream and Robert Richard.

STATEMENT OF THE CASE

Petitioners have failed to set forth "the facts material to the consideration of the questions presented." Supreme Court Rule 14.1(g). The following is a summary of the Findings of Facts of U.S. District Court Judge Robert Takasugi (Petition, Appendix B), which were undisputed by petitioners in their appeal to the Ninth Circuit:

Santa Ana City Employees Association ("SACEA") is the exclusive bargaining representative for all non-supervisory, non-professional employees of the petitioner City of Santa Ana (the "City"), including all non-supervisory library employees; Barbara Lambert ("Lambert") is a library employee of the City since 1966 and a director of SACEA. Robert Richard ("Richard") is the Library Director of the City; David Ream ("Ream") is the City Manager.

Prior to October 15, 1990, the tension between the staff of the City library and defendant Richard became the subject of public discussion. SACEA and its library members had protested to City management regarding Richard's conduct. The protests included assertions that

Richard mismanaged the library department and treated employees in an abusive and intimidating manner, and that Richard's conduct was having an adverse effect on service to the public.[1]

On October 1, 1990, SACEA President Eddie Bentley ("Bentley") spoke at a public meeting of the Santa Ana City Council. After reporting to the Council that there was a lack of communication between library staff and the Library Director and a lack of confidence in him, Bentley requested that the Council direct the City Manager to investigate the circumstances causing library staff members to work in fear of their jobs. Mayor Young requested the City Manager to investigate and provide a status report to the Council within two weeks.

On October 15, 1990, pursuant to a request from Bentley, Lambert addressed the Council at a public meeting during the public comments period. The proceedings were televised via cable to approximately 20,000 dwelling units in the City. In her remarks, Lambert communicated to the Council her belief and the belief of many of her fellow workers that Library Director Richard was mismanaging the City's libraries and that his conduct was causing great damage to the public, the library, and the library's employees.

On or about November 2, 1990, defendant Richard issued to Lambert a letter of reprimand "for insubordinate action taken by you at an evening session of the City

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[1] The evidence in support of this Finding included newspaper articles in the Los Angeles Times and The Register, the two largest daily newspapers in the area, which dealt with the problems in the library department and the employee protests.

Council and for not utilizing established procedures for a grievance." The reprimand accuses Lambert of making insubordinate statements when she criticized Richard in her remarks to the City Council and stated that the letter will be placed in Lambert's personnel file. SACEA, though counsel, protested the letter of reprimand by a letter to City Manager Ream, dated November 12, 1990. SACEA demanded that the letter of reprimand be withdrawn and that Richard by disciplined for violating Lambert's constitutional and statutory rights to speak, petition, and engage in union activity. The letter of reprimand was not rescinded.

SUMMARY OF ARGUMENT

Nowhere in the petition's repetitive incantations about the personal non-public nature of the speech in question does it state: (1) that prior to the speech, "the tension between the staff of the City library and defendant Richard became a matter of public discussion," (2) that two weeks prior to Lambert's speech, her union president had addressed the City Council about the library's problems, and had requested that the Council direct the City Manager to investigate the matter, (3) that the Mayor in fact requested the City Manager to investigate and report to the Council in two weeks, and (4) that Lambert, a union director, spoke to the Council two weeks later at the request of her union president, in a public meeting which was televised to approximately 20,000 cable subscribers in the City. (Petition, Appendix B, pp. 4-5). Petitioners' persistence in treating a dispute which was the subject of widespread press coverage and public debate as a "personal internal agency matter" is inexplicable. Whatever the reason for their refusal to accept the rulings of the lower courts, it should be evident that the

uncontested facts are alone sufficient to deny the petition. Moreover, the petition fails to demonstrate that the decision of the Ninth Circuit is in conflict with the decisions of this Court or those of other circuits, or that it raises an issue of law, the resolution of which is important to the public.

REASONS FOR DENYING THE WRIT

A. The Decision of the Ninth Circuit Does Not Conflict With The Decisions Of This Court Or Those Of Other Circuits.

1. Alleged Conflict with Waters v. Churchill.

Petitioners contend that "the Ninth Circuit basically ignored [Waters v. Churchill, ___ U.S. ___, 128 L.Ed.2d 686, 114 S.Ct. 1878 (1994)]. . . ." In fact, in footnote 2 to its opinion, the Court of Appeals expressly rejected petitioners' argument. [Appendix A6.] The Ninth Circuit was correct in its conclusion that while the reprimand mentioned specific examples, Lambert was disciplined for her entire statement. More importantly, Waters has no relevance to this case because there is no dispute here about the speech for which discipline was imposed.

Petitioners rely on the following passage from Waters:

> "So long as Davis and Waters discharged Churchill only for part of the speech that was either not upon an issue of public concern . . . it is irrelevant whether the rest of the speech was, unbeknownst to them, both on a matter of public concern and non-

> disruptive. An employee who makes an unprotected statement is not immunized from discipline by the fact that this statement is surrounded by protected statements."

In relying on this passage, [Petition, at 5], petitioners ignore the phrase, "unbeknownst to them." The issue before the Court in Waters was whether government employers could be held liable for punishing speech which was "unbeknownst to them." Justice O'Connor's opinion, which announced the judgment of the Court, and was joined by the Chief Justice and Justices Souter and Ginsberg, declares, at 114 S.Ct. 1882:

> "In this case, we decide whether the Connick test should be applied to what the government employer thought was said, or to what the trier of fact ultimately determines to have been said." [2]

In this case, the speech was made in an open televised session of the City Council; thus, there was no need to apply Waters because there is no dichotomy between what the employer "thought was said," and "what the trier of fact ultimately determines to have been said." Id. at 1882. Therefore, the decision of the Ninth Circuit is not in conflict with Waters.

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[2] Justice Souter, who joined the opinion of Justice O'Connor, emphasized that the Court's holding was that "a public employer who reasonably believes a third party report that an employee engaged in unprotected speech may punish the employee . . ., even if it turns out that the employee's actual remarks were constitutionally protected." Id. at 1891.

2. Alleged Conflicts With Decisions of Other Circuits.

Petitioners contend that the decision of the Ninth Circuit is in conflict with other circuits on the issue of what constitutes speech on a matter of public concern. In so arguing, petitioners mischaracterize the lower court's opinion in this case and grossly distort the holdings of the cases cited from other circuits.

Petitioners repeatedly characterize Lambert's speech as being a personal attack and an internal agency matter. When the mayor of a city directs the city manager to investigate the charges brought by the city employees' union that a city department is run by fear and intimidation, and that morale in the department is so low that it is adversely affecting public service, there can be no question about whether the subject is a matter of public concern. Thus, the predicate for petitioners' argument regarding conflicts with other circuits disappears when one considers that the Ninth Circuit correctly applied this Court's precedents in determining that the speech involved a matter of public concern.

Nor do the cases cited by petitioners establish a conflict. Daniels v. Quinn, 801 F.2d 687 (4th Cir. 1986), involved a teacher's aide who was allegedly punished for a private statement to a school board member about the lack of materials in her classroom. The Fourth Circuit correctly stated that the mere fact the statement was to a school board member does not cloak it with constitutional protection, but nothing in Daniels even remotely conflicts with the Ninth Circuit's treatment of Lambert's union speech in a public city council meeting about a matter that was the subject of an investigation by the City Manager at

the direction of the Mayor.

The Seventh Circuit cases cited by petitioners are even more inapposite. Linhart v. Glatfelter, 771 F.2d 1004 (7th Cir. 1985), also dealt with private speech. The court stated that the test of whether the speech involves a matter of public concern "requires us to look at the point of the speech in question: was it the employee's point to bring wrongdoing to light? Or to raise other issues of public concern? Or was the point to further some merely private interest?" 771 F.2d at 1010. The Ninth Circuit applied the same test here: it was clearly the point of both Lambert and the SACEA, of which Lambert was an elected officer, to bring to light through public city council meetings the wrongdoing of the Library Director in using intimidation and fear tactics to the detriment of employees and the public they serve.

Petitioners' reference to Phares v. Gustafson, 856 F.2d 1003 (7th Cir. 1988), is absurd. That case dealt with a claim that First Amendment protection should be afforded to statements by a clerical employee about how veterinarians were filling out forms. The Court said, at 1007:

> "It is difficult to understand how a dispute between clinicians and a staff member of the medical records unit concerning the proper method of abstracting the medical records would be a matter of concern to the general public."

It is even more difficult to understand the logic of petitioners' reliance on Phares, Linhart, and Dunn on appeal to this Court about whether a public speech to a

city council by a union officer is protected by the First Amendment.

Petitioners' attempt to characterize Lambert's speech as a personal attack on Richard leads them to cite Colburn v. Trustees of Indiana University, 973 F.2d 581 (7th Cir. 1992), as another case which supposedly conflicts with the Ninth Circuit. Colburn found that the point of the speech in question was to address how faculty infighting would affect the personal careers of the speakers; there was no public purpose to the speech. Id. at 587. Not only does Colburn offer no support for petitioners' "conflict" argument, that case recognizes that speech which is related to collective activity may be on a matter of public concern. Id. 586.

B. The Decision of the Ninth Circuit Does Not Rest on Any Novel Principles of Law Which Warrant the Granting of a Petition for Certiorari.

Petitioners have failed to cite any issue of law, the resolution of which is of importance to the public, as distinguished from petitioners. Indeed, the issues posed in the statement of questions presented demonstrate that petitioners are merely challenging the conclusions of the Ninth Circuit which are limited to the particular facts of this case.

The petition's questions 3 and 4 are predicated on erroneous characterizations of the speech which is at issue. In posing each question, petitioners state that the speech was on "the internal workings of a government agency." Nothing in the undisputed Findings of Facts supports this oft-repeated assertion. The Ninth Circuit correctly stated that "There is no question that Richard's management

style had become an issue of significant public concern by the time Lambert spoke to the council," citing Finding of Fact No. 5, supra, at p.2. In rejecting petitioners' claims for qualified immunity, the court stated:

> "In light of the prior public criticism and the city manger's investigation of Richard, and the fact that Lambert appeared before the city council as a union official, any reasonable official quickly would have recognized Lambert's speech as one addressed to a matter of public concern. The actions taken by Ream were retaliatory, not reasonable."

Nothing in the Ninth Circuit's decision can reasonably be characterized as raising an issue of law which is significant to the public. Indeed, on the undisputed facts of this case, the Court of Appeals correctly stated that "any reasonable official would have quickly recognized Lambert's speech as one addressed to a matter of public concern."

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: November 2, 1995

Respectfully submitted.

PAUL CROST
Reich, Adell, Crost & Cvitan
Counsel of Record

Attorneys for Respondents
Barbara Lambert, Santa Ana
City Employees Association